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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

STATE DEPARTMENT OF STATE
HOSPITALS AT COALINGA,

Plaintiff and Respondent,

v.

A.M.,

Defendant and Appellant.

F077042

(Super. Ct. No. 17CRAD684019)

OPINION

APPEAL from an order of the Superior Court of Fresno County. James R. Opplinger, Judge. (Retired Judge of the Fresno Sup. Ct. assigned by the Chief Justice pursuant to article VI, § 6 of the Cal. Const.)

Linda Zachritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie Weng-Gutierrez, Assistant Attorney General, Ismael A. Castro and Judy Wong, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant A.M. appeals an order finding he lacks the capacity to refuse treatment and compelling him to undergo the involuntary administration of antipsychotic medications from respondent, the Department of State Hospitals, over the course of a year. He contends the determination regarding his capacity to consent was made under the wrong standard of proof. To the extent this issue has been forfeited, he alleges ineffective assistance of counsel. For the reasons set forth below, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant is currently being held at the State Hospital in Coalinga pursuant to the Sexually Violent Predators Act, Welfare and Institutions Code section 6600 et seq. He appears to have been there since at least 2007, although it is unclear from the record whether he has been adjudicated as a sexually violent predator or is being held, awaiting trial, following a probable cause finding from 2012.

On November 13, 2017, respondent filed a petition for renewal of an order compelling involuntary treatment with antipsychotic medication claiming appellant is incompetent or incapable of making decisions about his medical treatment. On January 29, 2018, the court held a hearing on the petition where appellant appeared and was represented by the deputy public defender. Respondent proffered testimony from Dr. Robbie Chan showing appellant was diagnosed with paraphilia—sexual deviance toward female victims—and showed symptoms of schizophrenia. Dr. Chan testified appellant is very psychotic, believing he is a caged lion kept tame by medication. If off medication, appellant would seek out and attempt to rape female victims. Dr. Chan also testified appellant was extremely paranoid, feeling his medical injections are actually poison, and lacked insight into his condition, feeling he did not have a mental illness or that he needed to take medication. Dr. Chan opined appellant has no capacity to make decisions about his mental illness, does not understand the risks and benefits or side effects of

treatment, does not understand the possible consequences of not being treated, and needs medication for the rest of his life.

Appellant testified on his own behalf. He stated he was “a lion’s dead or whatever it is. They say I’m mental” and admitted to being diagnosed with schizophrenia. He claimed to be learning to live with his diagnosis and to be taking medication. He stated his medication helps him rest and calms him. He said, however, that he did not get agitated easily when not on his medication. Appellant noted his medication makes him sleep a lot and argued his doctors were ignoring his complaints about the medication because they wanted him to keep taking it. He confirmed he would not take his medication if he was not forced to take it, explaining “It’s my life. It’s my body. It’s my life. That’s what I choose to do.” When asked why he did not think he needed medication, he responded: “it’s just, we stubborn. It’s like, you know, the next man and same situation I’m in. There’s lots of people come through here, and they don’t want to take their medication. There’s no reason to force because they don’t want to take it. They make decisions on their own to take it. They don’t need it.”

Following the testimony, the court asked respondent, “And is there a standard of proof that involves—in your burden for you?” The transcript shows that appellant’s counsel responded, “Substantial evidence.” The case was then submitted by both sides and the court determined appellant “is incompetent to refuse medical treatment.” The court found “that the burden of proof has been made” under the relevant legal factors and listed those factors. The proceedings then concluded, and the court issued an order involuntarily medicating appellant. This appeal timely followed.

DISCUSSION

Appellant now contends the trial court prejudicially applied the wrong standard of proof because its decision should have been based on clear and convincing evidence. He recognizes, however, that his counsel provided the erroneous standard of proof but argues this should not constitute forfeiture of the issue under the invited error doctrine. Should

the court find that argument is forfeited, appellant claims ineffective assistance of counsel. Respondent recognizes the proper standard of proof is clear and convincing evidence but argues the issue was indeed forfeited, not under the invited error doctrine, but because appellant raised no objection. Respondent further contends a claim of ineffective assistance of counsel is not available to appellant because this is a civil proceeding. Regardless, appellant argues the error was harmless under the facts presented and that appellant cannot show prejudice under an ineffective assistance of counsel claim.

Standard of Review and Applicable Law

A competent adult has a common law and constitutional right to refuse medical treatment, including the administration of antipsychotic drugs. (*In re Qawi* (2004) 32 Cal.4th 1, 14.) However, an involuntarily committed patient may be forcibly treated with antipsychotic medication if a court has determined that he is not competent to refuse treatment. (*Id.* at p. 14; *In re Calhoun* (2004) 121 Cal.App.4th 1315, 1354.)

The superior court shall determine competence to refuse treatment by clear and convincing evidence, “so clear as to leave no substantial doubt, [and] sufficiently strong to command the unhesitating assent of every reasonable mind.” (*Conservatorship of Waltz* (1986) 180 Cal.App.3d 722, 733, fn. 14.) A judicial determination of competency to refuse treatment involves consideration of three factors: (1) whether the patient is aware of his situation and acknowledges the existence of his condition; (2) whether he understands the benefits and risks of treatment, as well as alternatives to treatment; and (3) whether he is able to understand and evaluate the information required to be given to patients whose informed consent is sought and participate in the treatment decision by rational thought processes. (*Riese v. St. Mary's Hospital & Medical Center* (1987) 209 Cal.App.3d 1303, 1322–1323 (*Riese*).) “We review an order authorizing involuntary administration of antipsychotic medication for substantial evidence.” (*People v. Fisher* (2009) 172 Cal.App.4th 1006, 1016.)

The Trial Court's Application of the Wrong Burden of Proof Was Not Harmless

We begin by considering how to review appellant's claim. Respondent contends appellant has forfeited the burden of proof issue by failing to object. We do not view the failure to object issue as cleanly as respondent contends. Rather than simply failing to object, appellant's counsel provided the court with an improper burden of proof when the court questioned what standard it should apply. Further, while this could be considered invited error, we see no tactical reason why counsel would, unprompted by any dispute, suggest a burden of proof that was lower than the clear and convincing standard. We need not resolve this issue, however, for regardless of the basis for claiming forfeiture we will exercise our discretion to review the allegation of error in this case. (See *People v. Williams* (1998) 17 Cal.4th 148, 161–162, fn. 6 [“An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. [Citations.] Indeed, it has the authority to do so.”].) We note that, were we to find the issue forfeited, we would have proceeded to consider the issue under appellant's ineffective assistance of counsel claim.¹

Next, recognizing that respondent concedes the proper burden of proof in involuntary medication cases under the Sexually Violent Predators Act is clear and convincing evidence, we consider whether the trial court's application of an erroneous standard is harmless error. Under *People v. Watson* (1956) 46 Cal.2d 818, 836, one demonstrating state-law error must show “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.”

¹ On this point we note that those accused under the Sexually Violent Predators Act are entitled to a statutory right to counsel that our Supreme Court has held triggers due process protections. (*People v. Hill* (2013) 219 Cal.App.4th 646, 652.) Whether appellant's need for medication arises under the treatment provisions of the Sexually Violent Predators Act or is authorized by conservatorship principles, where counsel is also authorized by statute under Probate Code section 1471, we have little doubt the involuntary medication of a detained individual is significant enough of a deprivation of liberty to trigger certain due process rights, including the right to competent counsel when statutorily authorized.

Respondent, reviewing the facts presented to the court, contends the evidence demonstrates any error was harmless because “there was ample evidence for the trial court to have found that appellant is incompetent to refuse medication under the ‘clear and convincing’ standard.” Respondent points out that neither appellant’s cross-examination of witnesses nor his direct testimony contradicted the evidence from Dr. Chan that appellant is “unaware of his mental illness and his need for medication, and that he is unable to participate in his treatment decisions.”

Were the issue whether substantial evidence supported the court’s conclusion, we would have little concern with respondent’s arguments. However, the record in this case shows the trial court applied a lower burden of proof than required in determining whether to involuntarily medicate appellant. Thus, the question is not whether there is evidence to support the trial court, but whether the evidence is sufficiently strong to satisfy the appropriate standard of proof. This case is thus more analogous to cases where the factfinder has been wrongly instructed on the burden of proof.

In criminal cases, where constitutional concerns not present here prevail, appellate courts have been extremely cautious in finding an error harmless:

“[I]f a reviewing court were to rely on its view of the overwhelming weight of the prosecution’s evidence to declare there was no reasonable possibility that the jury based its verdict on a standard of proof less than beyond a reasonable doubt, the court would be in the position of expressing its own idea ‘of what a reasonable jury would have done. And when [a court] does that, “the wrong entity judge[s] the defendant guilty.” ’ ” (*People v. Aranda* (2012) 55 Cal.4th 342, 368, quoting from *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281.) In civil matters, though, courts have evaluated “ ‘(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel’s arguments, and (4) any indications by the jury itself that it was misled’ ” to determine whether there has been a miscarriage of justice. (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 393–394.) We conclude such an analysis is appropriate here.

The record in this case shows that the state of the evidence strongly supported a finding appellant was incompetent under the clear and convincing evidence standard. Dr. Chan provided detailed testimony showing appellant believed he was a lion, had no capacity to make decisions about his mental illness, did not understand the risks and benefits or side effects of treatment, and did not understand the possible consequences of not being treated. Appellant's testimony began with an apparent confirmation of the lion ideation. As it continued, appellant made no clear denials of any of Dr. Chan's opinions, absent brief statements about the effects of his medication. With respect to his decision not to take medication, appellant merely stated a desire to choose on his own before noting that many others felt the same way. In the same answer, however, he suggested that he, like those others, did not need medication.

The record, however, is not as strong on the other points. As the proceedings occurred before the court, there are no other instructions to review. We note, however, that the court correctly recognized and applied the test for determining competence, suggesting familiarity with the subject matter. Respondent's arguments in closing did not touch on the burden of proof, only the evidence presented. But both appellant's counsel's statement and the court's direct request for the proper burden of proof indicate the court very likely relied upon a lower burden of proof than clear and convincing evidence in reaching its conclusion.

While it is a close call, given the court's direct question concerning what burden of proof to apply, we conclude appellant has demonstrated a reasonable probability that a more favorable result would have been reached in the absence of the error and, thus, has shown a miscarriage of justice. There is little doubt given appellant's own testimony that he is severely mentally ill. However, his testimony showed, at a minimum, that he was aware of and acknowledged his diagnosis as schizophrenic, that he recognized his medicine calmed him, and that the medicine caused him to sleep excessively. (See *Riese*, *supra*, 209 Cal.App.3d at pp. 1322–1323 [identifying relevant factors for determining

competence].) The weight to give this testimony, particularly considering the substantial evidence that appellant did not have an actual understanding of his condition or otherwise was competent to give informed consent, was therefore a critical component of the hearing. The court's application of a lower burden of proof than required leaves open the reasonable probability that appellant's testimony was sufficient to keep the court from finding the clear and convincing standard was met.

DISPOSITION

The order is reversed and the matter remanded for the court to consider the petition under the clear and convincing burden of proof.

HILL, P.J.

WE CONCUR:

POOCHIGIAN, J.

DETJEN, J.